



Federal Communications Commission  
Washington, D.C. 20554

April 7, 2017

Re: WC Docket Nos. 05-25 and 16-143, GN Docket No. 13-5, and RM-10593.

Dear Mr. Pickering,

I am writing in response to your April 3, 2017 letter to Chairman Ajit Pai. In that letter, you ask the Chairman to "direct the Wireline Competition Bureau to release publicly the list of counties that would be deemed 'competitive' under the test contained in the draft Order on Business Data Services that was released last Thursday and is currently being considered by the Commission for vote at the Commission's April 20 Open Meeting." Your letter asks that "this list be released this week, so that all interested parties . . . can evaluate the impact of the proposed Order."

However, the list you are asking the FCC to release would contain or reveal information that is both designated as highly confidential and currently subject to a protective order that safeguards highly confidential and competitively sensitive information from improper disclosure. The rules and procedures governing the public release of such information preclude the Commission from releasing it this week pursuant to your request. As a result, doing so would violate the Trade Secrets Act.

Your letter asks for the list this week based on a claim that "there is no longer any confidentiality interest in withholding this information from the public." In particular, your letter states that "[b]ecause this information would be released after the draft Order is adopted, there is no reason to withhold it prior to the Commission's vote." This argument is based on an apparent misunderstanding of the process as well as the FCC rules and policies that govern the potential public disclosure of information that is designated as highly confidential under the terms of a protective order. Indeed, the relevant protective order provides that if the Commission relies on or refers to any confidential information, "it will do so by redacting any Confidential or Highly Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access."<sup>1</sup> Moreover, the Commission is prohibited by law from publicly releasing confidential information unless and until it follows certain procedures, including providing the submitting parties an opportunity to object to its public release.<sup>2</sup> As such, any future release of information currently

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<sup>1</sup> *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Data Collection Protective Order, 29 FCC Rcd 11657, App. A, para. 8 (Wireline Comp. Bur. 2014).

<sup>2</sup> As noted above, releasing this information in violation of FCC rules and procedures would result in a violation of the Trade Secrets Act. *See* 18 U.S.C. § 1905.

designated as highly confidential—where such release is made in accordance with all applicable procedures and policies—does not, contrary to your letter’s suggestion, mean that the FCC can release it this week in violation of those protections.

Moreover, pursuant to the terms of the protective order, representatives of both INCOMPAS and its member companies already have authorized access to the information your letter seeks or they can readily derive that information from data that have long been available to them. For example, Angie Kronenberg and Karen Reidy of INCOMPAS along with representatives of INCOMPAS member companies, including Earthlink, Level 3, Sprint, TDS, and Windstream, already have authorized access. Identifying the list of counties only requires that they evaluate the publicly available FCC Form 477 data and the reported locations accessible under the protective order. Indeed, INCOMPAS and its member companies have already submitted analyses in this proceeding using similar data sets and calculations.

In short, your letter has made no showing why INCOMPAS or its member companies cannot “evaluate the impact of the proposed Order,” including the impact of the proposed competition standard on prices by relying on (and, to the extent you deem appropriate, critiquing) the standard itself as well as the relevant and available data.

Indeed, in the spirit of openness and transparency, the FCC made a redacted version of the Chairman’s proposed Order available to the public, as well as the entire unredacted version available to those that have authorized access to confidential data, three weeks before the agency is scheduled to vote on the item. This decision provides the public, including INCOMPAS and its member companies, with far greater access to information than under the Commission’s prior approach or that is required under the APA or any other governing law. In past cases, no one outside of the FCC would have been permitted to review a proposed order. They would only have been allowed to read the decision after the Commission voted on it. The Commission’s decision to make the proposed Order available to the public before the vote does not give INCOMPAS greater rights to data designated as confidential than it would have had otherwise. The fact that INCOMPAS members have access to the redacted and unredacted document through their representatives further undercuts any claim that INCOMPAS is unable to evaluate the impact of the proposed Order.

Sincerely,

A handwritten signature in blue ink, appearing to read "B Carr", with a stylized flourish extending to the right.

Brendan Carr  
General Counsel  
FCC